

**BEFORE THE REAL ESTATE AGENTS
DISCIPLINARY TRIBUNAL**

Decision no: [2013] NZREADT 18
Reference No. READT 26/12

IN THE MATTER OF

an appeal under s 111 of the Real
Estate Agents Act 2008

BETWEEN

EARL HENTON

Appellant

AND

**THE REAL ESTATE AGENTS
AUTHORITY CAC 20003**

First Respondent

AND

**MAX HOUSE, and BARFOOT &
THOMPSON LTD**

Second Respondents

MEMBERS OF TRIBUNAL

Judge P F Barber – Chairperson
Mr G Denley– Member
Mr J Gaukrodger – Member

HEARD at AUCKLAND on 5 December 2012

REPRESENTATION

The Appellant on his own behalf
Mr M J Hodge counsel for the Authority
Mr T D Rea counsel for the Second Respondents

DATE OF DECISION 22 February 2013

DECISION OF THE TRIBUNAL ON THRESHOLD ISSUE

Introduction

[1] Earl Henton (“the Appellant”) appeals a discretionary decision of Complaints Assessment Committee 20003 to take no further action on his complaint against Mr Max House and Barfoot & Thompson Ltd (the Second Respondents) under s 80(2) of the Real Estate Agents Act 2008 (“the Act”). Simply put, the complaint was that Barfoot & Thompson Ltd had not dealt satisfactorily with his complaint (as a vendor) to them about one of their salespersons.

[2] By agreement, on 5 December 2012 there was a preliminary hearing before us to address the following 'threshold' issue, namely, whether the conduct alleged by the Appellant is capable of falling within the definition of *“real estate agency work”* set out in s 4 of the Act and, therefore, whether it is capable of amounting to *“unsatisfactory conduct”* as defined in s 72 of the Act which reads:

“72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) is incompetent or negligent; or*
- (d) would reasonably be regarded by agents of good standing as being unacceptable.”*

[3] We also set out s.73 which defines *“misconduct”* as:

“73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
- (c) consists of a wilful or reckless contravention of—*
 - (i) this Act; or*
 - (ii) other Acts that apply to the conduct of licensees; or*
 - (iii) regulations or rules made under this Act; or*
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.”*

[4] The definition of *“real estate agency work”* in s.4 of the Act is as follows:

“real estate agency work or agency work—

- (a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and*
- (b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but*
- (c) does not include—*
 - (i) the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or*

- (ii) *the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or*
- (iii) *the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or*
- (iv) *the lending of money on mortgage or otherwise; or*
- (v) *the provision of investment advice; or*
- (vi) *the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006”*

Background

[5] The Appellant's complaint against the Second Respondents relates to the way in which concerns he raised with Barfoot & Thompson Ltd, as to the conduct of one of its salespersons, were dealt with.

[6] The salesperson, who had been engaged to market and sell the Appellant's property at 5B Ranier Street, Ellerslie, Auckland, had forwarded information to the purchasers of the property between the date on which the agreement for sale and purchase went conditional and its settlement date. The information related to proposed fencing work at a neighbouring property to be used as a Childcare Centre to which neighbours had raised objections.

[7] An enquiry into the conduct of the salesperson concerned is the subject of separate proceedings before a Complaints Assessment Committee of the Real Estate Agents Authority. No decision in that matter has yet been made. Probably, the outcome of this appeal is awaited.

[8] An agreed statement of facts has been filed by the parties but is very detailed and, for present purposes, we summarise the basic facts as follows.

[9] The complaint and this appeal involve the Appellant's dissatisfaction with the manner in which Barfoot & Thompson Ltd dealt with his original complaint about it releasing information to the purchaser after the sale and purchase agreement had become unconditional. Those at Barfoot & Thompson Ltd who handled the complaint were its Customer Relations Manager, Mr Max House, and one of its directors, Mr Garth Barfoot.

[10] The complaint and this appeal involve the Appellant's dissatisfaction with the manner in which the second respondent dealt with his original complaint. That also concerned the alleged conduct of a salesperson of Barfoot & Thompson Ltd, Ms Debbie-Lee Richards Wallace, in relation to the sale of the appellant's Ellerslie property, relating to an email message which Ms Wallace forwarded to the purchasers of the property prior to settlement.

[11] The email message which Ms Wallace forwarded was sent to her by the tenants of a neighbouring property at 1 Ranier Street. In the message, the tenants of that property advised that they would shortly be opening a Childcare Centre at the property, and they asked Ms Wallace to confirm that the purchasers of 5B Ranier Street were aware of this. The message then advised that the Council required that they must construct a two metre high acoustic fence on the boundary, to which some neighbours had objected. The message concluded with an invitation that the purchasers contact them to discuss

alternative options and in light of pressing timeframes, sought a response from the purchasers by 10.00 am the following day.

[12] Ms Wallace forwarded the email message to the purchasers who then expressed concerns and purported to cancel the agreement for sale and purchase in terms of an exchange of solicitors' correspondence. It appears that the purchasers were persuaded that they did not have sufficient grounds to cancel the contract, and they eventually settled the purchase in accordance with the agreement for sale and purchase.

[13] The Appellant took exception both to the fact that the information had been conveyed to the purchasers by Ms Wallace and to the manner in which it was conveyed.

[14] The Appellant questioned whether there was any legal requirement to have disclosed the neighbour's email message to the purchasers because (he said) relevant information could have been obtained by the purchasers from the Council had the purchasers made such an inquiry. He also objected to the fact that the information was communicated to the purchasers by email and considered that, if it was to be conveyed, it would have been more appropriately done by telephone or in a face-to-face communication.

[15] The Appellant considered that he had suffered financial loss as a result of Ms Wallace's conduct, and he complained to Barfoot & Thompson Ltd by email on 2 January 2012.

[16] At the time his complaint was made to Barfoot & Thompson Ltd's Customer Relations Manager, Mr Max House, it was unclear whether the property transaction would settle as the purchasers had purported to cancel the agreement, and the dispute was the subject of ongoing correspondence. The Appellant asserted that Ms Wallace's forwarding of the email message caused him to incur legal costs and, potentially, other costs as a consequence of a possible delay in settlement. He identified these further potential costs as his continued obligation to make interest payments on a \$560,000 mortgage, plus outlay for a bond, letting fee and pre-paid rent in respect of alternative accommodation which he had arranged in anticipation of settlement occurring on the due date.

[17] The Appellant asserted that there was a *"clear cause-effect between [Ms Wallace's] action and the situation to be remedied"*, and he required that Barfoot & Thompson Ltd provide him with solutions involving *"recovery of the extra costs via reduced commissions or other means"*.

[18] Messrs House and Barfoot each had some involvement in communicating with Mr Henton in relation to his complaint. Barfoot & Thompson Ltd's position was that Ms Wallace did nothing wrong by disclosing information to the purchasers about the proposed child care centre and that such disclosure was, in fact, required pursuant to Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. Rule 6.4 reads: *"6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client."*

[19] We note that in s.4 of the Act there is the following definition of *"client"*, namely, *"means the person on whose behalf an agent carries out real estate agency work"*. Usually that would be the vendor.

[20] Barfoot & Thompson Ltd would not agree to pay compensation or enter into further communications with the Appellant.

The Committee's Decision

[21] The Appellant then made complaints to the Real Estate Agents Authority not only about the conduct of Ms Wallace, which was the subject of his complaint to Barfoot & Thompson Ltd, but also about the in-house handling of his complaint by Messrs House and Barfoot on behalf of Barfoot & Thompson Ltd. The Appellant's complaint regarding Ms Wallace is presently under investigation by the Authority. However, the Complaints Assessment Committee dismissed his complaint regarding the conduct of Messrs House and Barfoot in its decision issued on 5 April 2012, against which he now appeals to us.

[22] In its decision, the Committee recognised that the Appellant's complaint regarding Messrs Barfoot and House related to the manner in which they dealt with his complaint regarding Ms Wallace. The Committee expressed the opinion that this conduct was not real estate agency work and, therefore, it could not amount to "unsatisfactory conduct", as defined in the Act. The Committee noted that "*misconduct*" was at the highest end of the spectrum. It is defined in s.73 of the Act (set out above). The Committee expressed the opinion that even on the view most favourable to the Appellant, there would be no reasonable grounds for concluding that the conduct complained of reached the threshold for misconduct. As already indicated, the Committee resolved to take no further action on the Appellant's complaint regarding Messrs Barfoot and House. Presumably, the Second Respondents to this appeal are Mr House and Barfoot & Thompson Ltd because they are licensees and Mr Barfoot is not.

The Issues

[23] The Appellant challenges the Committee's finding that the conduct of Messrs Barfoot and House in question was not real estate agency work, and he alleges further that it amounts to misconduct as he maintains that it was both wilful and disgraceful. He asserts that there was a wilful failure to meet Barfoot & Thompson Ltd's complaints process requirements by it not answering directly his complaint issues. He also asserts that the conduct was "disgraceful" based upon an assertion that Barfoot & Thompson Ltd did not give him a response which he considered satisfactory within the timeframe he had required.

The Threshold Issue

[24] The threshold issue is whether the conduct of the Second Respondents, in responding (or not responding) to the Appellant's concerns, was "*real estate agency work*" as defined in the Act. If it was real estate agency work, a substantive issue becomes whether the conduct was "unsatisfactory conduct" under s 72 of the Act. It is only in respect of real estate agency work that findings under s 72 are available. Findings of "misconduct" may be made in respect of conduct that is not real estate agency work under s 73(a) of the Act where a licensee can be found to have engaged in conduct that would reasonably be regarded as disgraceful by agents of good standing, or reasonable members of the public.

"Real estate agency work"

[25] “*Real estate agency work*” is defined at s 4 of the Act and that definition is set out above. Real estate agency work “*means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction*”.

[26] As Mallon J remarked in *Home Buyers Ltd and Francisca Dorientje Forster v Real Estate Agents Authority*, CRI 2011-485-82/83, 22/12/11, High Court Wellington:

“[18] *The Real Estate Agents Act came into force on 16 November 2009. As set out in s.3, its purpose is as follows:*

Purpose of Act

- (1) *The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agents work.*
- (2) *The Act achieves its purpose by –*
 - (b) *regulating agents, branch managers, and salespersons;*
 - (c) *raising industry standards;*
 - (d) *providing accountability through a disciplinary process that is independent, transparent, and effective.*

[19] *The Act requires any person who carries out “real estate agency work” to be licensed; and makes it an offence to carry out such work without a licence or an exemption from the requirement to have a licence, or to hold out that any person is licensed under the Act or exempt from being licensed under the Act, when they are not. The Act established the Authority to regulate the conduct of licensees. There are complaints and discipline provisions which apply only to licensees. The duties relating to real estate agency work apply only to licensees. **The cornerstone of the Act is therefore the definition of “real estate agency work”. That is because it determines whether the consumer protection provisions set up by the Act apply and whether an offence has been committed.*** [Our emphasis]

[27] The definition of real estate agency work set out at s 4 is the cornerstone of the Act. The definition serves as a gateway to the application of most of the consumer protection provisions in the Act because it determines both who is required to be licensed and what services provided by licensees will be subject to specific consumer protections provided by the Act.

[28] Counsel for the Second Respondents (Mr Rea) submits that, in responding to the Appellant's concerns, the Second Respondents were not undertaking work or services “on behalf of” the Appellant, rather they were dealing directly with him. In those circumstances, the Second Respondents submit, the conduct is not capable of being real estate agency work as defined.

[29] We agree with Mr Hodge that direct dealings between licensees and their vendor clients are among the most important services performed by real estate agents and regulated by the Act. He added that such services include providing a marketing plan and advising on the best method of sale, advising on matters which may need to be disclosed to prospective purchasers and disclosing matters relevant to the vendor's interests. We agree with that also but consider that the services are not to be particularly confined.

[30] Mr Hodge also submitted that if direct dealings between a licensee and a client do not amount to real estate agency work, then:

- (e) A person does not need to be licensed under the Act to perform these services, and he or she is therefore not subject to the consumer protections in the Act.
- (f) Even if a person is licensed under the Act, these services would not be subject to key consumer protections in the Act. For example, no matter how negligent a licensee had been in his or her dealings with the vendor, he or she could not be subject to the complaints and discipline regime of the Act if the services are not real estate agency work (ss 72 and 73(b)).
- (g) Key obligations under the Act and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 would not amount to real estate agency work, for example:
 - (i) the obligation to provide approved guides to vendor clients (ss 127 and 133 of the Act)
 - (ii) rules regulating the provision of appraisal (Rule 9.5)
 - (iii) rules regulating invitations to sign agency the agreements (Rule 9.8)

[31] It is further contended for the Second Respondents that, because an unconditional contract was in place at the time the conduct in issue in this case took place, the conduct was not *"for the purpose of bringing about a transaction"*. In fact, we consider that the transaction was not complete at material times in this case because settlement had not taken place.

[32] There can be no dispute that the purpose of the Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work. Accordingly, given the importance to the operation of the Act of the definition of real estate agency work, we consider that it is important that the definition is not construed too narrowly.

[33] Mr Hodge submitted that conduct by licensees which occurs after a transaction is brought about can also amount to real estate agency work where that conduct is closely linked to services provided for the purpose of bringing about the transaction, with findings under s 72 available. In principle, we agree. We agree with Mr Hodge that, in effect, such conduct forms part of a course of conduct and services to bring the transaction about, and with the entire course of conduct being the real estate agency work performed on behalf of the client.

[34] On a technical analysis, a transaction may, be said to be concluded on an agreement being declared unconditional. However, the reality is that licensees regularly undertake steps on behalf of clients after contracts become unconditional, unconditional agreements are often at risk of failure before settlement, and licensees regularly take active steps to ensure such agreements do settle. To argue that such steps do not form part of the real estate agency work performed by the licensee for the client is, Mr Hodge submitted, wholly artificial. We agree.

[35] It is an accepted part of a real estate agent's role to disburse the deposit, assist with the pre-settlement inspection, and hand over the keys post settlement. All these services are generally provided *after* an unconditional contract is in place. Further, if an issue arises post contract or even post settlement, it is expected that the agent will assist in resolving those issues. Dealing with post- contract and post-settlement issues is part of the overall real estate agency which work, in practice, licensees carry out.

[36] It is relevant that real estate agents regularly market themselves as providing an "end to end" service. One of the reasons a consumer may employ an agent (rather than sell privately) is that he or she expects the agent to assist in resolving any issues with the purchaser, including any issues that occur post contract or post settlement. In fact, the understanding that an agent will perform some work after the contract is formed may well be fundamental to the consumer's decision to sign an agency agreement in the first place and, accordingly, key to bringing about the transaction.

[37] In this sense, much of the work done or services provided by licensees post contact or post-settlement can be said to have been done for the purpose of bringing about a transaction and will form part of the real estate agency work performed for the client.

Famularo and Murphy

[38] Counsel for the Second Respondents (Mr Rea) cites a decision of the Wellington District Court *REAA v Famularo*, Wellington District Court, CRNs 11085500439, 0440, 0441, 7 September 2011) in support of his argument for a narrow interpretation of "real estate agency work" under the Act. Counsel also referred to the decision of the Tribunal in *Murphy v CAC 10060 and Anor.* [2012] NZREADT 52]. In *Murphy* the Tribunal stated, *inter alia*:

*"[14] In Real Estate Agents Authority V Famularo (DC WN CRNs 11085500439, 0440, 0441, 7 September 2011 Broadmore J) the court did not uphold a criminal charge for a former real estate agent offering services to assist vendors with private sales. The court found there needed to be a **third party** involved to constitute real estate work. We consider that in this case there was a third party and an agent and property for sale. For Abby Close we consider that taking a client to a property listed with another agent for the purposes of showing the client the property (even though no contractual arrangement has been entered into between Ms Cussen and the vendor) is for the purpose of bringing about a sale (and presumably a commission arrangement with the other agents). It thus constitutes "work or services ... for the purpose of bringing about a transaction" – even if the transaction was some time in the future.*

[15] We consider that every case must be determined on its own facts and that the Tribunal will determine whether any particular conduct falls within the definition of Real Estate agency work by having regard to other cases of the Tribunal, the words of the Act, the conduct complained of.

[16] The issue of whether mail drops and brochures are real estate agency work is difficult. We reserve the question of whether or not simply putting a flier or card in the letterbox of any person could amount to real estate agency work, although consider that in certain circumstances if the facts showed that it was for the purpose of inducing someone to consider selling their property then s 4 might apply. However, in this particular case the three cards that were dropped were all dropped in letterboxes

of properties which were listed as a sole agency with signboards outside showing a sole agency. We consider that this also amounts to real estate agency work. The only purpose of Ms Cussen dropping the cards was an endeavour to somehow sell the property or interest the vendor in selling the property through her efforts, i.e. to become the agent to sell the property.

[17] *The work done in respect of the property at Ridgeway Road also falls within the definition of “real estate agency work” as it was part of an arrangement with the Professionals where Ms Cussen was dealing with the vendor with an aim to see whether or not she could sell or swap another property with the vendor’s property – a third party was involved.”*

[39] Mr Rea submitted that *Murphy* is authority for the proposition that it is “an essential element of real estate agency work that a third party must be involved.” Counsel for the Authority (Mr Hodge) does not take the decision in *Murphy* to go that far; nor do we.

[40] In *Murphy*, the Tribunal noted that aspects of the *Famularo* decision (a District Court prosecution for unlicensed trading) were of “some assistance” in considering the definition of real estate agency work, in the particular context of leaflet drops, the Tribunal did not adopt wholesale the analysis set out in that decision. It is submitted by Mr Hodge that to adopt the narrow interpretation set out in *Famularo* in considering whether the actions of licensed real estate agents amount to unsatisfactory conduct, would be a retrograde step. Mr Hodge submits that *Famularo* was wrongly decided and that it is inconsistent with other decision relating to unlicensed trading prosecutions as well as numerous Tribunal decisions

[41] In any event, it is relevant that *Famularo* was a decision in respect of an unlicensed person allegedly carrying out real estate agency work. Argument in that case centred on whether the defendant’s activities fell within the (c)(i) exception of the definition of real estate agency work for “provision of general advice or materials to assist owners to locate and negotiate with potential buyers”, rather than whether the conduct was “real estate agency work” under the over-arching para (a) of the definition in s 4 of the Act.

[42] Mr Hodge submits that in contrast to the position in a criminal prosecution of an unlicensed person or organisation focusing on the application of the exception at (c)(i) (of the definition) to the unlicensed person’s business model, in disciplinary proceedings against a licensee it is artificial to attempt to “carve up” parts of a licensee’s business which amount to real estate agency work and parts which do not. We agree.

[43] Mr Hodge noted that where an unlicensed person or organisation operates a business model in which they may provide general advice or assistance to a private seller in devising a marketing plan, but never takes part in any subsequent negotiations between vendor and purchaser, the fact that the unlicensed person did not deal with any third party may well be relevant to whether his or her actions fall within the (c)(i) exception for providing “general advice or materials;”.

[44] Mr Hodge also submitted that it is for this reason that well known organisations such as *Homesell* and *Greendoor*, which offer services to private sellers, operate business models precluding contact between the organisation and any third party. All their contact is with the vendor and this helps ensure that the business’s operation falls within the (c)(i) exception. He also submits that such a distinction does not apply to a licensee who acts

throughout the transaction, from the initial appraisal to the final inspection, in his or her capacity as a real estate agent. Again, we agree.

[45] Mr Hodge submitted that where a licensed real estate agent or salesperson provides services, in trade, to another person with the broad intention that a real estate transaction may ultimately result, such services are real estate agency work as defined by the Act. Of course, we agree. Where such services fall below acceptable standards, findings of unsatisfactory conduct are available. Similarly, he submitted that services provided by a licensee to a client after a transaction has been arranged, where those services are closely linked to services provided for the purpose of bringing about the transaction, can also amount to real estate agency work. Again, we agree.

The stance of the Appellant

[46] The Appellant put his issues as follows:

- (1) The failure of the entire Barfoot & Thompson Ltd organisation to deal with multiple real estate matters requested by him as a customer.
- (2) Failure of Barfoot & Thompson Ltd to return multiple telephone calls on real estate issues when it agreed to do so.
- (3) Conscious failure of Mr Max House to deliver contractual and legal requirements in the handling of the complaint process.
- (4) The Second Respondents' conscious failure to investigate alleged statements of dishonesty of an agent.
- (5) Failure of Barfoot & Thompson Ltd to advise on the whereabouts of trust moneys when requested.
- (6) Barfoot & Thompson Ltd withdrawing funds from a trust account without establishing clear title.

[47] The Appellant then gave his rather helpful views on the issues as he sees them and, with regard to "real estate work," he stated:

"The definition of Real Estate work seems to be a technical point here and involve a lot of manipulation of the meaning of 3 everyday words. To the consumer, "real estate work" test is 'Is the activity in question part of the business activities of a real estate business, and is the relationship real estate in nature. The relationship between myself and Barfoot & Thompson is only for business activities that organisation offers. Ignoring any technical manipulation of wording of the act, the relationship cannot seriously be defined as anything else other than "real estate work" in nature. ...

I view this "Threshold" test to be that clear. If any single of the above listed issues triggers the 'real estate in nature' test, or a combination thereof, then we are over the threshold and all matters are in, ...

Disgraceful Conduct

Bearing in mind the examples of behaviour that is in the statement of facts, is it acceptable to be provided with such feedback the whereabouts of trust funds, and withdrawing funds without clear title. Failure to advise on Trust Funds when requested, and withdrawing them without clear title in itself actually brings the 'disgraceful conduct'(via theft listed above) Threshold test into play, which is enough on its own to meet the Threshold.

...

The case now seems to cover the failure of Barfoot & Thompson, escalated to the responsibility of the directors, to advise on a number of issues vitally important questions to a customer and return many calls, that were agreed to by B& T, with a customer. The major focus is of the lack of actions of Garth Barfoot, Peter Thompson, Kiri Barfoot and Wendy Alexander, as well as the actions of Garth Barfoot, in their capacities as directors of Barfoot & Thompson. Sharon O'Brien stated them all by title as referred in the agreed statement of facts. As the complaint is of an entire escalation process, it then must also include Kevin Lowe and Sharon O'Brien, and obviously Debbie-lee Wallace Richards.

It was made very clear by Garth Barfoot, a director of Barfoot & Thompson, that he had no interest in looking into an issue where a signed legal document outlined the dishonesty of a Barfoot & Thompson agent. A reasonable person would investigate such an issue. Garth Barfoot, as a director, elected to hang his response on a "oh well, they settled, so we got away with it" position. How can this be acceptable actions?, and even more so by a Director. Notably, the issue was serious enough, and so obvious, that the REAA chose to investigate in its own capacity with no complaint filed. Irrespective of the future outcome of the REAA investigation into Debbie-lee Wallace Richards, for Garth Barfoot to decide to not to investigate based on no information is not the actions of a reasonable person in a management position.

It was suggested to me to ask the CEO to look at and provide a constructive solution. She personally reviewed and did not find any reason to supply any better feedback or solution. She actually stated before she even looked onto it, and after, that she was happy with the outcomes. This demonstrates that the behaviour is cultural at Barfoot & Thompson.

When the Greenlane manager was asked informed of escalation to Head Office, he replied with "You can do, they will do nothing" and hung up. That is a clear statement in the confidence in the likely in-actions of the leadership of Barfoot & Thompson.

Wendy Alexander when asked whether she would provide a constructive solution stated "I haven't read the details, but I won't do anything". Another clear statement of the attitude of the organisation.

The escalation process was urgent due to timing, and Barfoot & Thompson after many days consciously avoided the topic knowing the time constraints to hide behind a fabricated need for a complaint to be filed. There was no

logic why an escalation required a complaint filed, except clearly to deliberately avoid the topic until after the period answers were required by.”

[48] In his final oral submissions the Appellant, inter alia, emphasised that as vendor he was always anxious that nothing be hidden from a purchaser and, particularly, that it be made clear the house had stucco cladding.

The stance of the Second Respondents

[49] Counsel for the Second Respondent, Mr Rea, very helpfully provided detailed written submissions and response to the submissions of the other parties. He also made formal oral submissions towards the end of the hearing, as did the Appellant and Mr Hodge for the Authority.

[50] As Mr Rea emphasised, this case involves a complaint against Barfoot & Thompson Ltd about its handling of the Appellant’s complaint. More particularly, it involves its refusal to meet the Appellant’s demands that it discount commission to compensate the Appellant for legal costs which he alleges he incurred as a consequence of the transmission of an email message by a Barfoot & Thompson Ltd salesperson. That was the said email message passed on by the salesperson alerting purchasers of the property that a Childcare Centre was to be opened at a neighbouring property.

[51] Barfoot & Thompson Ltd considers that the salesperson had a clear duty to convey this information to the purchasers under Rule 6.4 (set out above). That company advised the Appellant that it would not be paying him compensation nor would it be entering into further correspondence with him. This led the Appellant to complain to the Real Estate Agents Authority not only about the conduct of the salesperson in disclosing the email correspondence to the purchasers, but also about the alleged conduct of Messrs G Barfoot and M House in dealing with his complaint. However, the Committee found that their conduct did not involve real estate agency work and dismissed the complaint on that basis.

[52] In Mr Rea’s written submissions of July 2012, he submitted that the Committee was entirely correct to find that dealing with this complaint was not real estate agency work. Mr Rea put it to be a pre-requisite, under s.72 of the Act, that in order for there to be “*unsatisfactory conduct*” the conduct in issue must be “*real estate agency work*”. He also stated:

The definition of real estate agency work was considered by the District Court in Real Estate Agents Authority v Famularo, Wellington District Court, CRNs11085500439,0440,0441,7 September 2011.

In Famularo, Judge Broadmore contrasted the words in the definition “on behalf of” another person, with the word “for” and concluded that they implied a very different nature of the work. His Honour considered that “both in normal usage, and in the context of a statute the subject matter of which is the relationship between principals and agents, those words [on behalf of] imply interaction with a third party on behalf of a principal.”

His Honour also considered the words “for the purpose of bringing about a transaction”, and observed that they “are, appropriately, words of limitation which make it clear that not everything which one person might do on behalf

of another which might have some connection with a possible transaction, is within the paragraph".

Regardless of whether one adopts the meaning of "on behalf of", which Judge Broadmore considered was consistent both with normal usage and the context of the statute, or whether one reads the definition as though it includes the word "for", the same conclusion is reached. In dealing with Mr Henton's complaint, Barfoot & Thompson was not undertaking work or providing services on behalf of Mr Henton, nor for him.

Nor was the purpose of any conduct to bring about a transaction. At the time of Mr Henton's complaint, there was no further real estate agency work to be performed. A transaction had already been brought about, with an unconditional agreement for sale and purchase. Settlement was a matter for the solicitors to effect. Under the terms of its agency authority, Barfoot & Thompson became entitled to commission immediately upon the sales contract becoming unconditional."

[53] Mr Rea noted that Mr House had no communications at all with the Appellant until after the sale of the Appellant's property had settled, which was on the agreed settlement date of 10 January 2012. When he had just returned from leave, Mr House had responded to Mr Henton by email on 26 January 2012. Mr Rea submitted that Mr House's communications could not be regarded as for the purpose of bringing about any transaction because the sale process was complete.

[54] Mr Rea noted that Mr Henton asked Barfoot & Thompson Ltd to reduce its commission which, Mr Rea put it, that company had already earned for a transaction which had then been effected so that, he submitted, in responding to such a complaint that company could not be regarded as "bringing about a transaction" in terms of the definition of real estate agency work in the Act.

[55] Mr Rea also submitted that since Mr Barfoot is not a licensee under the Act, it must be outside the jurisdiction of the Authority, or us, to make any orders against him and this illustrates (as Mr Rea put it) "*the absurdity that would follow from a finding that dealing with a complaint "is real estate agency work"*". Mr Rea then submitted:

"The acid test for considering whether any work which may occur within a real estate office is "real estate agency work" is to consider whether an unlicensed person -be they a receptionist, personal assistant or a company director - could be liable in a criminal context for performing the work.

If dealing with Mr Henton's complaint was real estate agency work) then Mr Barfoot has committed an offence under s. 141 of the Real Estate Agents Act 2008, which provides:

"A person commits an offence if the person carries out any real estate agency work without being licensed to do so under the Act ..."

Real estate agency work cannot have any different meaning in the context of s. 72 than for the purposes of s. 141. Under s. 141 it an offence to carry out real estate agency work without a licence.

The Act envisages corporate licensees which may have directors who are not themselves licensed. The company satisfies the eligibility criteria for a real estate agents licence pursuant to s. 36(3), provided that at least one officer of the company is eligible to be a real estate agent or branch manager and s 44(2) requires that at least one officer of a licensee company must hold an agent's licence.

Directors who do not hold licences clearly could not engage in real estate agency work, and therefore could not perform functions such as negotiating sales contracts on behalf of vendors. However, it would be absurd to suggest that a director of a real estate agency company could not legitimately become involved in responding to a complaint about the company.

Barfoot & Thompson has created a position of "Customer Relations Manager" presently held by Mr House, whose role includes handling customer complaints. It just so happens that Mr House holds a salesperson's licence, although he does not carry out real estate agency work. It could not be seriously argued that such a qualification could be a pre-requisite for the role.

...

"Analysis

The essence of Mr Henton's complaint is that Barfoot & Thompson Ltd allegedly did not provide him with an adequate response to his complaint. Mr Henton is also critical of the fact that communications with him were by email, rather than formal letter sent by post on company letterhead. He had complained that not all of his questions were specifically answered. He is critical of Mr House's grammar. He is critical of the timing of the response. He is also critical of the fact that Barfoot & Thompson Ltd took its commission by deduction from the deposit, which it was quite entitled to do, as the agreement for sale and purchase was unconditional.

Even on any analysis of the allegations that is favourable to Mr Henton, the alleged conduct would fall well short of the threshold of disgraceful conduct. ...

"Barfoot & Thompson Ltd dealt with Mr Henton's complaint promptly and courteously. It made clear that the complaint was not accepted and that no compensation would be paid and that it would not engage in further correspondence with him. Mr House's email message of 25 January 2012 is identified by Mr Henton as the communication that was "the most offensive". However, viewed objectively, there is nothing whatsoever improper or offensive about the response."

[56] We also had the benefit of detailed submissions in reply from Mr Rea on behalf of the Second Respondents.

[57] Inter alia he then submitted that if dealing with the Appellant's complaint was real estate agency work, Mr Barfoot has committed an offence under s 141 of the Act which provides that a person commits an offence if the person carries out any real estate agency work without being licensed to do so under the Act.

[58] Mr Rea put it that in order to comply with the law, the Customer Relations Manger role at Barfoot & Thompson Ltd, presently held by Mr House (who happens to be licensed), would have as a pre-requisite the requirement for a licence which (Mr Rea submits) could not be seriously argued to be the case.

[59] Mr Rea then noted that the provision of an approved guide is a mandatory pre-requisite to entering into an agency agreement (s 127(1)(a) of the Act), and to obtaining a person's signature on a contractual document (s 133). He put it that the function of providing an approved guide could be undertaken by any person within a real estate office operating in a clerical or administrative capacity, without needing to hold a real estate agent's or salesperson's licence. He instanced a personal assistant employed by an agent or salesperson being able to prepare and send a letter enclosing the approved guide and that there would be no suggestion that person acted improperly; but that if such a person were to become involved in dealing on behalf of a vendor with prospective purchasers, then such a person would be acting as an unlicensed salesperson.

[60] Mr Rea noted that Rule 9.5 provides that an appraisal must be provided in writing and must comply with certain other requirements and it could be envisaged that a real estate company would use unlicensed staff in the preparation of an appraisal, e.g. in compiling comparable sales data and other clerical work. He seemed to be putting it also that a real estate company might employ a person with valuer's qualifications to assist a licensee prepare appraisals for vendors, and submitted that would clearly not be real estate agency work or, otherwise, valuers would need to be licensed as real estate agents. He continued: *"As with delivery of an approved guide, the physical act of posting out or handing an appraisal is a clerical function which could be performed by a receptionist or personal assistant on behalf of a licensee"*.

[61] Towards the end of his typed reply submissions, Mr Rea noted that branch managers frequently engage in listing and selling properties in addition to their managerial roles; and they do not require a separate salesperson's licence in addition to their branch manager's licence to engage in those activities as licensed sales people; and branch managers are each authorised to carry out real estate agency work. Section 49(1) of the Act provides: *"A branch manager's licence or a salesperson's licence authorises the licensee to carry out real estate agency work for or on behalf of an agent"*.

[62] Mr Rea accepted that *"supervision"* (of a salesperson), as defined in s 50(2) of the Act, will amount to real estate agency work because the definition expressly requires that the agent or branch manager must become personally involved in the performance of real estate agency work. Section 50(2) provides: *"In this section **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure –*

[a] that the work is performed competently; and

[b] that the work complies with the requirements of this Act."

[63] Mr Rea then stated:

"A manager who "directs and controls" agency work IS, himself, becoming a party to the performance of the real estate agency work. This is completely

different from responding to a vendor's complaint about real estate agency work, once it has already been performed.

A complaint may be dealt with by a branch manager, as they are the logical first port of call for complaints relating to work originating from the branch.

However, branch managers need not undertake this role. The process could be centralised, as in the case of Barfoot & Thompson, with the appointment of a customer relations manager, or it could be undertaken by an unlicensed director, like Garth Barfoot. This distinguishes the process from "supervision" under s. 50, which could only properly be done by a licensed agent or branch manager".

[64] Mr Rea then summarised the situation as:

"Mr Henton's "complaint" to Barfoot & Thompson was, in essence, a demand for payment of monetary compensation by way of a reduction in commission for alleged costs incurred as a consequence of conduct by a salesperson. When Barfoot & Thompson refused Mr Henton's demand for compensation, the proper course for Mr Henton to have followed, if he believed there was a basis for his claim, would have been to bring a civil claim seeking compensation. Instead, he made a disciplinary complaint. This has led to a proliferation of proceedings with:

- (a) Mr Henton's underlying complaint about the salesperson still working its way through the system with the Real Estate Agents Authority;*
- (b) His separate complaint about the complaint-handling process, which was dismissed by the Committee; and*
- (c) The present appeal against that dismissal taking up time and resources of the Tribunal.*

The second respondents understand the Authority's wish to try to widen the scope as much as possible for potential unsatisfactory conduct findings, but it is submitted that the present attempts are taking this too far, and the conduct in issue in this case falls well outside any appropriate scope of the Authority's jurisdiction.

Even if the Tribunal has some concerns about preliminary activities such as the preparation of appraisals or agency agreements not being real estate agency work, the process of an agency responding to a complaint made against it lies at the far end of the spectrum. An agent clearly acts for and on behalf of itself in responding to such a complaint. This is particularly so when the complaint is coupled with a demand for payment of compensation.

If the position were found to be otherwise, then an agency could never take a robust approach in its own defence without being concerned about subsequently having to incur significant irrecoverable costs in responding to a complaint before a Complaints Assessment Committee following which there would then be an unfettered right of appeal by the complainant to the Tribunal without any cost or potential adverse costs exposure to the complainant. That

position would be wholly unsatisfactory from an industry perspective, and it is not necessary in order to promote the interests of the public. It should be enough that the underlying complaint can be pursued, without a further ability in collateral proceedings to complain about dissatisfaction with a response to a complaint.”

Additional oral submissions

[65] In his final oral submissions, Mr Rea emphasised the implications for Barfoot & Thompson Ltd of the issue now before us. It feels it should be able to have a process dealing robustly with complaints.

[66] Mr Rea also seemed concerned about the need to comply with the rules of the business' professional indemnity insurer.

[67] He seemed to be emphasising that there cannot be a need to be licensed in order to do administrative work in the real estate industry and a question is what is the scope of the clerking assistant's function. He asked would it be possible for a clerk to be carrying on real estate agency work? As our member Mr J Gaukrodger pointed out, support staff would not normally be carrying out real estate work but the licensee is responsible for their work.

[68] The concern of Mr Rea, for the Second Respondents, is that (in his submission) an in-house complaint handling process, following the completion of the real estate transaction, should not come within the jurisdiction of the Authority in that a Licensee could, in effect, be subject to extortion from any unhappy party to a real estate transaction.

[69] Mr Rea emphasised that he was not relying on the *Famularo* decision.

[70] Mr Rea submitted that when a real estate firm is dealing with a complaint after completion of the transaction, it is simply protecting itself and is no longer involved with the sale and purchase transaction and it must be able to reject a demand for money from a disgruntled vendor. Essentially, it is submitted for the Second Respondents that dealing with a complaint after the event, as in this case (he put it), is not real estate agency work. He submitted that once the contract had become unconditional and the 10-day rule for retention of deposit had expired, then the deposit funds cease to be the subject of any trust and the agent is entitled to take commission at that point.

[71] He particularly submitted that we need to address why unlicensed (under the Act) workers in real estate offices can do some things and not others; and he put it that “we need to carve up the overall process”. He asked whether personal assistants to a licensee require a licence. He noted that Mr Barfoot did not have a licence but Mr House did, and again asked what can unlicensed people in a real estate office legitimately do. Our chairperson then commented that we are more interested in dealing with the facts of this particular case and the conduct of the Second Respondents which has been complained about.

[72] Mr Rea put it to be an issue whether Mr Barfoot was in breach of the Act in this case as he seemed to have done very little other than take a phone call from a consumer. He also asked whether dealing with a complaint may be a type of work which could mean Mr Barfoot had breached the Act.

Discussion

[73] In final oral submissions, Mr Hodge noted that the outcome of this threshold issue (of the scope of 'real estate agency work') might avoid a hearing on the substantive issue under appeal. That is whether the Committee should have taken no further action, but that substantive point is not the issue before us at this point. We are now confined to whether the present complaint relates to real estate work.

[74] Mr Hodge also put it that the sale and purchase transaction in this case was very much on foot at material times when the complaint was made by the Appellant consumer who wanted his complaint addressed to preserve his sale as a vendor. As we have explained above, we agree that the transaction was still on foot. However, Barfoot & Thompson Ltd told the Appellant that transaction was over and that he had now embarked upon a separate complaints process.

[75] We certainly agree with Mr Hodge that the precise facts of a case matter and that we should take a common sense approach. We are simply considering the scope of the work of real estate agents and, in particular, whether complaints made to them by a consumer can be part of "*real estate agency work*" as defined in s.4 of the Act.

[76] As we have already indicated above, we think it inappropriate to endeavour to artificially carve up the nature of the service work expected from a real estate agent to consumers, particularly to his principal, the vendor. Usually, a licensee will have administration backup in the form of receptionists, clerks, typists and the like. However, the licensee is responsible for the work of those persons which is part of the licensee's agency work. We consider that, normally, if a complaint is made against a licensee or any of the assistants of the licensee, then the licensee's and/or the firm's dealing with the complainant is very much part of real estate agency work.

[77] It is commendable that Barfoot & Thompson Ltd seem to have a complaint process in which it endeavours to deal with any complaint in a fair and robust manner.

[78] In our view, all that we have described above as having been carried out by Barfoot & Thompson Ltd for and with the complainant was part of the real estate transaction process of selling the complainant's property. Both Respondents respectively held a licence under the Act and their staff were acting on their behalf.

[79] We consider that the way in which a licensee, acting in a supervisory capacity, responds to a vendor client's concerns or complaint about the actions of a salesperson will typically amount to real estate agency work. Of course, each case must be assessed on its particular facts. For instance, a relevant factor is how closely linked the supervisor's conduct was to the overall services provided by the agency to the client. Where a complaint is raised prior to a transaction settling, or even after that stage in some circumstances, the actions of a licensee in responding to a complaint may be integral to the success of the transaction and the overall service provided to the client.

[80] The definition of real estate agency work (set out above) at s 4 of the Act explicitly refers to the work done both by salespersons and by supervising branch managers and agents. Paragraphs (a) and (b) of the definition provide:

"Real estate agency work ...

- (a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and
- (b) includes any **work done by a branch manager or salesperson under the direction of**, or on behalf of **an agent** to enable the agent to do the work or provide the services described in paragraph (a)” (Emphasis added).

[81] The Act contemplates a broad view of the services provided by real estate agencies to clients, with both the work done directly by salespersons and the functions of the supervising branch manager or agent forming part of the real estate agency work undertaken. That view reflects the reality of consumer interactions with real estate businesses. The client may deal with one or more salespersons and one or more supervising branch managers or agents in the course of selling a property, and would likely consider that all of those interactions form part of the real estate agency work performed on his or her behalf.

[82] We consider that, in this case, the real estate transaction had not been completed at the time of the Appellant’s complaint, because settlement had not taken place. In any case, we consider that responding to a vendor’s complaint, even one made after the contract has become unconditional, or even settled, can constitute real estate work. The licensee is to provide a full marketing service to the vendor and part of that is answering complaints.

[83] We realise that Mr House came into the picture after settlement of the property transaction, but he was part of the overall real estate service being provided by Barfoot & Thompson Ltd. A dispute over commission seems to us to be very much part of real estate agency work even if it takes place after the transaction has been settled.

[84] Insofar as Mr Rea submitted that since Mr Barfoot is not a licensee under the Act it must be outside our jurisdiction to make any orders against him, that seems logical to us in the circumstances of this case, but we do not understand Mr Barfoot to be a party to this appeal.

[85] Very simply put, while it is obvious that the words “*for the purpose of bringing about a transaction*” are fundamental to the definition of “*real estate agency work or agency work*”, and must be respected, they should not be used to over-confine a situation so as to relieve a licensee of responsibility for unsatisfactory conduct in the course of what is, in reality, part of real estate agency work.

[86] We also observe that while deficiencies in the work of a receptionist, or personal assistant, or company director of a licensee may not be within our jurisdiction; their work (or that of other staff, or officers) on behalf of a licensee is work for which that licensee is responsible as if it were the licensees’ own conduct.

[87] Of course, the appeal to come before us has as its substantive allegation that Barfoot & Thompson Ltd, allegedly, did not provide the Appellant with an adequate response to his complaint. The alleged conduct of Ms Wallace is not before us. Frankly, from what we have heard to date, we find it difficult to conclude that the conduct of Ms Wallace, which so concerns the appellant, was inappropriate in principle.

[88] As noted above, Mr Rea made the point that if dealing with the Appellant’s complaint was real estate agency work, Mr Barfoot and other staff may have committed an offence under s.41 of the Act which provides that a person commits an offence if the person carries out any real estate agency work without being licensed to do so under the Act. Our

answer is that normal support or administration work for a licensee could not in itself be the carrying out of real estate agency work by the staff member but is part of the overall conduct of the licensee for whom the staff are working. Section 141 reads:

“A person commits an offence if the person carries out any real estate agency work without –

- (a) Being licensed to do so under this Act; or*
- (b) Being exempt from the requirement to be licensed.”*

[89] Mr Rea put it that a Customer Relations Manager role at a real estate agency would have as a prerequisite that manager be a licensee if such work is real estate agency work. As we have said, it could not be seriously argued that support and administration staff of a licensee need to be licensed unless they move into directly participating in work or services to bring about a property transaction. In that respect we can only agree with what Mr Rea submitted as we have set out in our paragraphs [59] and [60] above.

[90] We also note Mr Rea’s submissions, set out above along the lines that the process of an agency responding to a complaint when a transaction has been completed or virtually completed, particularly one coupled with a demand for payment of compensation by reduction of commission, unreasonably extends the process of real estate agency work; that an agency could never take a robust approach in its own defence; and that such a dispute can be pursued in a civil forum. We see some possible merit in these views and, as we have already indicated, the question whether a particular activity is real estate agency work needs to be analysed on the particular facts of the case.

[91] We also note the type of submission from Mr Rea that when a real estate firm is dealing with a complaint after completion of the transaction, it is simply protecting itself and is no longer involved with the sale and purchase transaction and must be able to reject a demand for money from a disgruntled vendor. We consider that it is all a question of degree on the particular facts of the case. In the present case we consider the Appellant’s complaint to have been made in the course of the real estate agency work being carried out for him by Barfoot & Thompson Ltd.

[92] The cause of the Appellant’s complaint in this case was the forwarding of an email by a salesperson to the purchaser on 19 December 2011 which was three days after the agreement for sale and purchase had been declared unconditional but before settlement. This led the purchasers to consider terminating the agreement (which was communicated to the Appellant vendor by the purchasers’ solicitor). The Appellant raised his concerns with Barfoot & Thompson Ltd on 20 December 2011. Settlement was due to take place on 11 January 2012.

[93] The Appellant raises several concerns about the way in which his concerns were dealt with by Barfoot & Thompson Ltd, both in the period 20 December 2011 to 11 January 2012 (before settlement) and after 11 January 2012. We conclude that interactions between the Appellant and Barfoot & Thompson Ltd were sufficiently closely linked to the overall services provided to the Appellant vendor so that the conduct in issue formed part of the real estate agency work performed.

[94] Accordingly, with regard to the preliminary question put to us, we find that the alleged conduct of the Second Respondents is capable of amounting to “unsatisfactory conduct” as defined in s.72 set out above. We direct the Registrar to arrange a telephone

conference with counsel as soon as convenient to discuss procedures for resumption of this appeal.

[95] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

Judge P F Barber
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member